United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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75-1149

United States Court of Appeals

FOR THE SECOND CIRCUIT

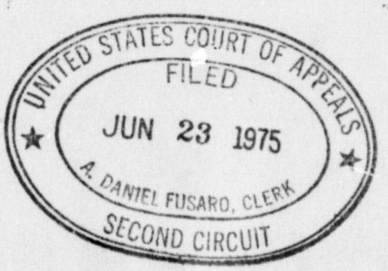
Docket No. 75-1149

UNITED STATES OF AMERICA
Appellee,

—against—

VINCENT PACELLI, JR.
Appellant.

REPLY BRIEF FOR APPELLANT VINCENT PACELLI, JR.



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APPELLANT'S REPLY BRIEF

CONTENTS

I. Restricted cross-examination

A. Perjurious implication of Pacelli in a narcotics transaction

The trial court precluded the defense from asking any questions whatsoever of Lipsky concerning his prior testimony against Pacelli, involving Pacelli in the meeting with Lombardero at Yellowingers. Although told that the purpose of the inquiry was to show that Lipsky "falsely and perjuriously implicated Pacelli in a criminal offense", the court forbade any inquiry on the ground it was "remote" and "irrelevant" (A. 633). In apparent recognition that such ground of exclusion is wholly inadequate, the Government argues that the extrinsic proof of Lipsky's perjury in the prior case was less than conclusive (brief, p. 17). The Government also cites a post hoc opinion of Judge Stewart's, which the defense never received, has not seen, and was unaware of until it received the Government's brief. In that opinion, apparently, Judge Stewart supplies a new rationale: that Nunnziata's testimony was not proof of the perjury. This rationalization is equally unavailing.

The conclusiveness of Nunnziata's proposed collateral proof of Lipsky's perjury is not determinative. The defense was entitled to inquire about the matter, in the hopes that Lipsky himself would admit the perjury. If there is a rule of law that forbids the defense in a serious criminal case from asking a question unless it is in possession of conclusive proof of the answer, it has not been cited to nor heard of by appellant. The cogency of extrinsic proof is relevant only at a later stage, after the witness has failed to give the hoped for answers and the defense seeks to impeach him extrinsically. The Government and Judge Stewart therefore miss the main point in evaluating the extrinsic proof. The point is that defendant was

entitled to inquire.

Furthermore, the Government's evaluation of Nunnziata's testimony is wholly unpersuasive. According to Lipsky, he and Pacelli sat at a table in Yellowfingers, Lombardero arrived, and the three of them sat at the table and talked. The car keys were then passed by Pacelli to Lipsky (See appellant's brief, p. 18). According to Nunnziata, however, Lombardero entered the restaurant, met Lipsky, and handed him an object (A. 921). Lipsky then left (A. 922). It is therefore plain from Nunnziata's testimony that he could see clearly into the restaurant, and could see who Lombardero met and talked with. It is simply inconceivable if Lombardero met and talked at a table with both Lipsky and Pacelli, and Pacelli gave Lipsky the car keys, as Lipsky testified, that Nunnziata would have testified the way he did. The Government cannot supply a reconcilation of the Lipsky and Nunnziata testimony, and it could not do so in United States v. Mallah (See Appellant's brief, p. 19). The inference is overwhelming that one of the witnesses, Nunnziata or Lipsky, lied. The defense was surely entitled to ask the jury to believe that the liar was Lipsky, since Nunnziata was a narcotics detective and gave his testimony under oath at the behest of the Government.

The Government's claim that Nunnziata's testimony was inadmissible cannot be taken seriously. His testimony was not hearsay at all, since it was a statement in which the Government had manifested its adoption, by offering it. Proposed Rules of Evidence, Rule 801 (d)(1). In any event, prior testimony of a witness adduced by a party against whom it is presently offered universally comes in free of hearsay objections. McCormick, Evidence, 617 (2d ed. 1972).

The Government's claim that Nunnziata's testimony did not establish his ability to see inside the restaurant (brief, p. 18) is equally vaporous. Nunnziata testified that he did see Lipsky and Lombardero meet inside the restaurant. Moreover, had the defense been permitted to inquire of Lipsky, Lipsky would have said that the restaurant contained large picture windows permitting a person easily to see in and out of the restaurant. He so testified in Mallah (A. 916).[1]

Finally, the Government argues that the evidence was cumulative because, although the defense did not succeed in proving that Lipsky committed gross perjury in prior cases in which Pacelli was a defendant, it could have done so. The Government suggests that rather than proving the perjury the way the defense tried to prove it, the defense might have culled from the thousands of pages of transcript in the 1973 Sperling case Lipsky's admission that he was not "confused" in those trials, as he testified in this trial. This belated guidance would have been better received had it been proferred during the trial below. In any event, however, the defense is entitled to prove a fact its own way, and not the way the prosecution would prefer. Furthermore, the presence of an opportunity to prove a fact by one by one method hardly makes cumulative a sincere, serious effort to prove it in another manner. The conclusive answer to the Government's argument, however, is that even if the defense had clearly and cleanly proved Lipsky's perjury regarding promises in the prior trials, this would be a far cry from proving what was sought to be established here: not merely that Lipsky would lie against Pacelli, but that he would

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[1] Talking about this episode in United States v. Bassi et al, 73 Cr. 441, on April 23, 1975, Lipsky said that as he sat in Yellowfingers, "I saw Luis walking up to the restaurant, there was glass around the outside so you could look right out and see who was walking down the street toward the place..." Tr. 158.

perjuriously implicate Pacelli in a serious criminal offense. The two lines of impeachment are entirely separate and independent.

B. Proof that Lipsky was promised immunity by the Government

The defense had a perfect right to prove that Assistant United States Attorney Feffer knowingly and willfully elicited perjury from Lipsky, for the reasons elaborated both below and in its brief, namely, the effect of this conduct upon Lipsky's state of mind and therefore his willingness to fabricate and invent facts to buttress his story[2], and appellant is unable to conceive of how the Government could call "a battery of witnesses" (Government's brief, p. 25) to prove otherwise. The importance of the evidence required its admission, and the Government's claim that it would have sidetracked the jury from the main issue is speculative at best. The matter could have been proved by the defense by asking five or six questions (as was done in United States v. Mallah). No witnesses were called in rebuttal by the Government in Mallah. Such witnesses, if any exist, would have to be metaphysical magicians to have extricated Mr. Feffer from his own words.

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[2] Contrary to the Government's claims (brief, p. 26), Lipsky's story in March was not "virtually identical" to his story below. There were not only numerous inconsistencies, Lipsky added no less than three people to the story. See appellant's brief, pp. 10, 29. The excluded evidence was relevant to explain not only why Lipsky embellished the story, but why he has not retracted it.

Nor did Pacelli make the "exact same argument" on the first appeal. What he complained of there was the court's refusal to permit Lipsky to be asked if he had not committed perjury with the full knowledge of the prosecutor, and its refusal to permit inquiry into discussions with the prosecution about the perjury. The first question was arguably not within Lipsky's knowledge and therefore objectionable as to form. As to the second, this court said the discussions were "of extremely tenuous relevance". 491 F. 2d at 1120. Unlike the present instance, there was not and could not have been an offer of proof as to the content of those discussions, and their relevance was arguably speculative. Thus, while appellant is of the view that the court's dictum in the previous case was ill-considered, it has almost no bearing on the present issue.

But the Government's argument that the defense was not even entitled to prove its more limited offer--that Lipsky heard the Government promise him immunity and then denied it under oath--is outrageous. The Government suggests that Lipsky's testimony below, elicited by the Government, to the effect that his prior testimony was an "unintentional foul-up" and merely "innaccurate" testimony, could have been proved perjurious by confronting Lipsky with his Sperling admission that he was not confused. This illustrates the perniciousness of excluding cogent evidence in order to preserve the Government's reputation. The Government is now virtually admitting that it elicited perjury from Lipsky below--as indeed it did --and is justifying the trial court's protection of the perjury by arguing that had counsel been more inventive and industrious, and less direct, the perjury could have been exposed.

Quite apart from that, the Government cannot be serious in suggesting that Lipsky's admission in Sperling that he was not confused would have been tantamount to clear proof that his testimony, in Pacelli II and III, and below, was perjurious. Lipsky would surely have found a method of reconciling that admission with his claims of "unintentional foul-up".

C. The defense was entitled to prove that Lipsky suggested, one month before the Parks murder, that two witnesses be burned

The Government concedes that Lipsky's suggestion, in January, 1972, that two witnesses be burned is probative of Lipsky's propensity to violence in general, and to the likelihood in particular that he himself murdered Patsy Parks. [3] It makes the surprising argument, however, that

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[3] The remark was also highly probative of Lipsky's mental condition. See Point III infra.

despite its high probative value the statement is inadmissible because Lipsky admitted participating in the murder (brief, p. 28). The argument is ludicrous.

Pacelli's defense was that Lipsky lied when he included Pacelli in the murder. It was vital to that defense to show that Lipsky's story was false in as many particulars as possible, in the hopes that the jury would find it false en toto insofar as it implicated Pacelli. The statement to Gordon tended, with other evidence, to strongly suggest that the story was false: that Lipsky himself had thought up, engineered, and carried out the murder; and that he was not merely a passive, nonviolent spectator who did nothing but supply matches to cremate the body. Of course the defense had no way of proving directly that Lipsky committed the murder alone, or with one or more companions, and that was of little moment to the defense.[4] What was crucial was that Lipsky's role was not what he swore it was. Had the proffered evidence been heard by the jury, it might well have concluded that Lipsky lied about his role, that he was the instigator, engineer, and principal perpetrator and that his story implicating Pacelli was a fabrication.

In United States v. DeLoach, 504 F. 2d 185 (D.C. Cir. 1974), the chief Government witness was a co-conspirator who testified that he drove the defendant to the murder victims, waited while defendant left with a gun, heard shots, saw a body, then picked up the defendant and drove off. The defense tried to argue in summation that the witness, not the defendant, had committed the murder and was implicating the

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[4] The defense did not concede that Lipsky committed the murder with someone else, as the Government claims (brief, p. 28). See Tr. 1559.

defendant to save his skin. Curtailment of the argument was held reversible error. Said Judge Wright, the restrictions "cut to the core of counsel's theory of the case." Id. at 191. When an accomplice is testifying against a defendant, wide latitude should be permitted. Id. at 190. Here, as in DeLoach, the restrictions "deprived [the defendant] of the substance of his defense." Id. at 191. There is no basis upon which the court's refusal to permit the inquiry can be defended, nor be characterized as harmless.

II. The right to a psychiatric examination

In an effort to support the trial court's refusal to permit a psychiatric examination of Lipsky, the Government claims that the defense's expert, Dr. Abrahamsen, said that such an examination would not assist him (brief, p. 39). The testimony was to the contrary. Although Dr. Abrahamsen indicated to the judge that he doubted that an examination would lead him to different conclusions than he had already reached (A.765), he testified that it would be useful to explore with Lipsky his nightmares and fantasies (A.766). At that point, the inquiry was cut off by the court (A.766).

The Government also relies on the remote, flimsy hearsay competency examination, which Lipsky himself labelled a "farce" (A.409) as foreclosing the question of Lipsky's testimonial incompetence or mental illness. Contrary to the Government's claims (brief, p. 40), however, that examination did not find Lipsky free of mental disease or defect. Rather, it merely found no defect "that would interfere with Lipsky's ability to understand the charges against him, consult with his lawyer in his defense or cooperate in courtroom procedure" (A. 37) and thus contains a negative pregnant. It was plainly no determination of mental health, testimonial competency, or credibility. Moreover, most of the data upon which the defense relied to obtain a psychiatric examination of Lipsky was not available to or known by the doctors who examined Lipsky in December, 1972. Manifestly, the purpose of an examination shapes its content, and an examination for the purpose of determining competency to stand trial may have little relevance when the question

before the court is something else. See United States v. Driscoll, 399 F.2d 135 (2d Cir. 1968) (where, incidentally, Dr. Abrahamsen was again the Government's expert).

The Government inexplicably labels as "preposterous" appellant's observation that one can be competent to stand trial without being a competent prosecution witness, and claims that this exposes "the absurdity of [appellant's] entire argument" (brief, p.40). The test of competency to stand trial is essentially a test of rationality, see United States v. Sullivan, 406 F.2d 180 (2d Cir. 1969), however, while the test for competency as a witness, even though greatly watered down in recent years, is different. A witness is not competent to testify unless he has minimal observational and memory capacities, in addition to rationality, and an understanding of the oath. Doron v. United States, 205 F.2d 717, 718 (D.C. Cir. 1953). This understanding, according to Wigmore "clearly" includes "a sense of moral responsibility of the duty to...speak the truth." 2 Wigmore Evidence §495(3d ed. 1940)(emph. in original).

The examination sought would clearly have shed light on Lipsky's understanding of the oath and his sense of moral responsibility to speak the truth, whereas there is not the slightest indication that the December, 1972 examination was at all related to the matter of testimonial competence. Nor, is there a single finding in the reports that remotely speaks to Lipsky's understanding of the oath or his ability to tell the truth.

Furthermore, as was pointed out in the motion for psychiatric examination, Lipsky has been imprisoned under great stress for more than three years (A. 16). During this period, as Dr. Abrahamsen

pointed out, Lipsky received heavy dosages of drugs (A. 763, 789). While appellant would certainly concede that mental illness or mental health at one time is probative of a mental condition at a somewhat later time, see United States v. Matos, 409 F.2d 1245 (2d Cir. 1969)[5], three years of stressful confinement would be plenty of time for an incipient mental illness to become pronounced.[6] The crucial point, however, is that Lipsky may very well be competent to stand trial today and still be an incompetent witness or, though competent to testify, have serious psychological impairments to his credibility. This seems so obvious that appellant is baffled by the Government's labelling of the argument as "preposterous".

No less baffling is the Government's claim of an "absence of any substantial evidence to suggest mental illness in Lipsky." (brief, p. 40). There was an abundance of evidence, from numerous sources, of Lipsky's sickness. Lipsky's lawyer thought Lipsky was mentally disturbed, deteriorating rapidly, on the brink of insanity, incompetent to stand trial, and "capable of going crazy as hell."

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[5] An elementary observation which the trial judge, whom the Government would arm with boundless discretion, did not understand (A.386)

[6] Psycopathy is also difficult to diagnose readily. See Saxe, Psychiatry, Psychoanalysis, and the Credibility of Witnesses, 45 Notre Dame L. Rev. 238, 247(1970); 1 American Handbook of Psychiatry 581 (Ariete ed. 1959); Cleckley, The Mask of Sanity 421 (1955).

(A. 15, appellant's brief, p. 37-8). Assistant United States Attorney Feffer apparently agreed (A. 15). So did Lipsky (A. 16, 30, 391). The court was also informed, during cross of Lipsky, when the motion was renewed, that a defense psychiatrist who had been observing Lipsky's testimony had concluded that Lipsky was a "psycopath, a pathological liar, and egomaniac"(A. 629-30). Quite apart from this massive collection of uncontradicted opinion evidence, the facts themselves strongly indicate to anyone reasonably familiar with the literature of psychiatry that Lipsky is, as Dr. Abrahamsen described him, "a very sick man."(A. 759). It is most unlikely that the Government could have produced a competent expert to testify otherwise. Equally significant, moreover, is that at no time, in opposition to the defense's motions to examine Lipsky, or in its brief in this Court, did the Government ever produce an affidavit, reference to psychiatric literature, or factual argument taking issue with the defense's contentions that Lipsky is seriously mentally ill. A man who participates in the murder of Patsy Parks, suggests to a friend that he "burn" witnesses, bangs his head against the wall in anger, hits his hand against walls repeatedly, jumps up and down on scales and throws them in the ocean, holds a gun to his brother's head, shoots out a TV set because the picture rolls, signs cards and letters with a claw, makes faces and noises at children to scare them, constantly watches horror programs, adopts and uses numerous aliases of horror program characters, cheats and steals from his mother, and repeatedly and often pointlessly lies and perjures himself under oath, is a "very sick man" whose credibility must be seriously doubted on that account. If Lipsky

could be considered mentally healthy and normal, it is difficult to imagine what would be left of modern concepts of mental illness.

The Government also fails entirely to suggest what interests might have militated against the requested psychiatric examination. There were none. On the showing made, it is clear beyond doubt that the examination would have produced probative evidence for the defense. Had Lipsky been examined by a psychiatrist who reached conclusions similar to those of Dr. Abrahamsen, no court could have ruled the testimony out. In thus precluding the defense from examining Lipsky, the trial court denied the defense access to evidence which was "vital to the defense." Washington v. Texas, 388 U.S. 14, 19 (1967), and deprived defendant of Due Process. Cf. Psychiatric Examinations of Witnesses: Standards, Timing and Use by Indigents, 55 Iowa L. Rev. 1286(1970). Given the crucial nature of Lipsky's testimony and its lack of corroboration, the denial of a psychiatric examination is analagous to trying an accused, when there is ground to doubt his competency, without a competency examination and hearing. As the Court held in Pate v. Robinson, 383 U.S. 375(1966), when there is a history of "pronounced irrational behavior", the court denies Due Process if it does not conduct a competency hearing of the accused, sua sponte. If there is any rationale by which Due Process prohibits trying an accused under such circumstances but permits his conviction for murder when the only witness against him has a "history of pronounced irrational behavior" which the defendant is not permitted to test by a psychiatric examination, the Government has not suggested it.

While there is a modicum of discretion in determining whether to order a psychiatric examination, such discretion is not "a potential without restraint" but must be "guided and controlled by fixed legal principles...in a manner to subserve and not to impede or defeat the ends of substantial justice" People v. Russel, 69 Cal, 2d 187, 194, 443 P. 2d 794, 799(1966):

> "All exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue....When the court passes upon a motion for psychiatric examination of the complaining witness, the question before it is whether...it is necessary or proper that psychiatric knowledge...be utilized in order to aid the trier of fact in its assessment of credibility. This decision must rest for the most part on...whether an emotional or mental condition is involved which a body of laymen either would be unable to detect or would be unable to relate in terms of effect to the matter of credibility." 443 P. 2d at 800.

That discretion was manifestly not exercised here.

The defense more than met its burden of producing evidence which cast substantial doubt upon Lipsky's capacity and or credibility.[7]

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[7] The cases relied upon by the Government do not support the decision below. In United States v. Gebhart, 436 F. 2d 1252 (8th Cir. 1971), the defendant claimed that the prosecuting witness was incompetent as a matter of law. Affirming, the court noted that far from adducing any evidence of testimonial incompetence, the defendant was relying upon psychiatric reports which specifically found the witness capable of testifying. In United States v. Russo, 442 F. 2d 498(2d Cir. 1971), defendants did complain on appeal that the trial judge should have granted a psychiatric examination of the Government's main witness. There, however, no evidence was adduced that the witness was mentally ill, defendants merely relying on the witness's admissions of lies in the course of the conspiracy testified to and the fact that the witness had visited a psychiatrist in the course of marriage counseling. See Id. at 503; Government's brief in Dkt. No. 35255, p. 23. Moreover, defendants were charged with a crime having a maximum penalty of five years and actually received two years. United States v. Skillman, 442 F. 2d 542 (8th Cir. 1971) is even less in point. There, defendants were convicted of stealing postage stamps, there was substantial documentary corroboration, and the only basis for the requested psychiatric examination was a claim that the witness was a narcotics addict and a criminal. There was no evidence of mental illness.

Having done that, appellant was entitled to have Lipsky examined. See People v. Russel, supra; State v. Franklin, 49 N.J. 286, 229 A. 2d 657(1967). Furthermore, as appellant argued in his main brief, an even less stringent showing is required where, as here, the questioned witness is the key to the Government's case and the charge is a very serious one. Ballard v. Superior Court of San Diego, 64 Cal 2d 159, 410 P. 2d 838(1966); Psychiatric Examination of the Mentally Abnormal Witness, 59 Yale L. J. 1324, 1338(1950). In such circumstances, the right should "encompass simply a good-faith demand based upon a need for adequate preparation of the defense." Saxe, Psychiatry, Psychoanalysis, and the Credibility of Witnesses, 45 Notre Dame L. Rev. 238, 251(1970). Compare the great liberality with which courts grant requests for psychiatric examinations of the accused, United States v. Marshall, 458 F. 2d 446(2d Cir. 1972), and appoint psychiatrist to help present an insanity defense, United States v. Chavis, 486 F. 2d 1290(D.C. Cir. 1973). Those liberal standards cannot be reconciled with the decision below.

III. Admissibility of the expert testimony

Testimony similar to that rejected by the court below has been held admissible in numerous cases, dating back to the previous century. Ingalls v. Ingalls, 257 Ala. 521, 59 So. 2d 898, 911 (1952); Fries v. Berberich, 177 SW 2d 640 (Mo. App. 1944); State v. Butler, 27 N.J. 560, 143 A. 2d 530 (1958); Ellarson v. Ellarson, 198 App. Div. 103, 190 N.Y.S. 6 (1921); Taborsky v. State, 142 Conn. 619, 116 A. 2d 433 (1955); Derwin v. Parsons, 52 Mich. 425, 18 N.W. 200 (1884); Effinger v. Effinger, 48 Nev. 209, 239 P. 801 (1925); Markowitz v. Markowitz, 290 SW 119 (Mo. App. 1927); State V. Perry, 41 W. Va. 641, 24 SE 634 (1896); Alleman v. Stepp, 52 Iowa 626, 3 NW 636 (1879); People v. Cowles, 246 Mich. 429, 224 NW 387 (1929). It is not the law, if it ever was, that a trial judge in a serious criminal case has discretion to reject such evidence. Its exclusion has been held reversible error in both civil and criminal cases. Ingalls v. Ingalls, supra, (civil); Ellarson v. Ellarson, supra (civil); State v. Pryor, 74 Wash. 121, 132 P. 874 (1913) (criminal); People v. Bastian, 330 Mich. 457, 47 NW 2d 692 (1951) (criminal); Anderson v. State, 65 Tex. Crim. 365, 144 SW 281 (1912). See also, People v. Neely, 228 Cal. App. 2d 16, 39 Cal. Rptr. 251 (1964).[8] In United States V. Miller, 411 F. 2d 825, 830 (2d Cir. 1969), moreover, this Court implicitly held that it would be reversible error to exclude psychiatric testimony regarding the effect of hypnosis on the credibility of the Government witness.

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[8] Nor is United States v. Barnard, 490 F. 2d 907 (9th Cir. 1973) substantial support for the decision below. The charges there involved marijuana. Moreover, the proferred expert testimony was merely that the witness "would lie when it was to his advantage to do so" and was based upon reading a twelve year old psychiatric report and the witness' grand jury testimony and observing the witness "for part of the time he was on the stand." In holding that rejection of the testimony was not reversible error, the 9th Circuit noted that the experts' "knowledge about [the witness] was limited, to say the least."

As the California Supreme Court noted when reversing the trial court's exclusion of similar testimony, there should be some finding in the record indicating that the discretion was soundly exercised and based upon legal principles. People v. Russel, 70 Cal. Reptr. 210, 443 P. 2d 794, 802 (1968). The cryptic remark below that the evidence would be "of no use to the jury" (A. 845), is the equivalent of that found wanting in Russel ("That invades the province of the jury"), and wholly fails to reveal the basis for the exclusion. The Government speculates that Judge Stewart could have "doubted the meaningfulness" of the testimony (brief, p. 32). If by that it is meant that the judge might have been unpersuaded by Dr. Abrahamsen, then surely that possible rationale for exclusion is illegitimate. The doctor's credibility was "at most [a matter] of weight...for the jury, whose role is to resolve 'battles of experts'"..United States v. Bohle, 475 F. 2d 872, 874 (2d Cir. 1973).

Apart from the absence of a reviewable rationale, the record reveals weighty reasons why little deference should be afforded to the trial judge's alleged "discretion". In questioning the relevance of the defense's cross, the court proclaimed that cross-examination could not establish that Lipsky was psychotic: "You can't show me that. I need some expert testimony." (A. 369). The court expressed doubts that Lipsky's mental condition in 1972 was relevant (A. 368). The court then said that it intended to allow Dr. Abrahamsen's testimony (A. 1075), but indicated, quite erroneously (Jenkins v. United States, 307 F. 2d 637 (D.C. Cir. 1962)),that the testimony could not be based upon anything not in evidence (A. 722, 724), and asked for a voire dire for the purpose of making sure that the doctor

did not testify to anything not already in evidence (A. 729). In his examination of Dr. Abrahamsen, moreover, the court indicated almost total ignorance of psycopathy (A. 751, 753, 754, 757, 758). This court therefore has no basis for presuming that discretion was exercised upon legitimate or informed criteria.

As in its efforts to support denial of a psychiatric examination, the Government fails to suggest that Dr. Abrahamsen's conclusions lacked scientific validity, are not generally accepted in the field of psychiatry, or are based upon inadequate observation. [9] Rather, the Government invites this court to become the jury and calls attention to its cross-examination of Dr. Abrahamsen wherein resort was had to the familiar tactic of "isolated examination of separate components that by themselves may seem insignificant." Saxe, Psychiatry, Psychoanalysis and the Credibility of Witnesses, 45 Notre Dame L. Rev. 238, 255 (1970). Such "zealous concentration on the separate components of the psychiatric diagnosis" is calculated to distract "the jury from the consideration of the entire constellation of antisocial personality factors" contained in the diagnosis. Id. at 257. It was legitimate, it was skillful, it was clever, but it was for the jury to evaluate.

The Government relies upon Dr. Abrahamsen's admitted respect for the jury system as proof that Dr. Abrahamsen had nothing to add to their understanding of Lipsky's mental condition and credibility (brief, p. 31). Even if this were relevant, which is doubtful, the Government ignores the record when it suggests that Dr. Abrahamsen said he had no advantage over the jury in assessing Lipsky's credibility. He didn't say that (A. 829). On the contrary, he testified

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[9] No such serious suggestion could have been made. See Davidson, Forensic Psychiatry 218 (1952).

that he did "indeed" have "something to contribute" to the jury's understanding (A. 823), e.g. fitting Lipsky's life patterns into a meaningful mosaic (A. 823-824), showing Lipsky's propensity toward violence and vindictiveness and the relationship of those traits to a willingness to lie (A. 825-826).

The testimony would manifestly have been helpful to the jury. In the first place, it would have helped them evaluate Lipsky's claims that he was nonviolent (A. 356) and would, if believed, have assisted the defense in its efforts to establish the likelihood that Lipsky engineered the murder himself and was falsely implicating Pacelli. Secondly, it would have helped the jury evaluate Lipsky's general credibility. As Dr. Abrahamsen testified, Lipsky had a distorted perception of his own self-interest (A. 761) and an inability to get a realistic picture of what was going on around him (A. 1152), or to distinguish reality (A. 751), a characteristic of some psychopaths and all psychotics (A. 757). [10a] Lipsky "rejects blame for anything he has done and therefore blames everyone else" (A. 762). The jury, had it heard and believed this evidence, might have been able to understand why Lipsky would falsely implicate Pacelli in a gruesome crime which he himself committed.

[10a] The Government says that "a very different issue" would be presented were psychiatric evidence available to establish psychosis, "a mental disorder characterized by complete lack of ability to perceive reality" (brief, p. 31). Yet Dr. Abrahamsen was not asked whether Lipsky's mental illness, in addition to psychopathy, could also be characterized as "psychotic". As Dr. Abrahamsen explained, the two labels are not mutually exclusive, and one may be a psychopath with psychosis (A. 758). Few concepts are as unclear as "psychosis". It has been called a synonym for insanity, as well as "a severe mental disturbance of any sort." Davidson, Forensic Psychiatry 332 (1952). There is virtually no such thing as a "complete" inability to perceive reality; it is a matter of degree. It is therefore clear that, on the Government's own definition of psychosis, Dr. Abrahamsen, had he been asked, would have had to say that Lipsky had psychotic characteristics or was at least a borderline psychotic, since Lipsky has difficulty distinguishing reality. In any event, as Judge Mansfield noted, the label assigned by a psychiatrist does not and should not control legal standards. United States v. Kohlman, 469 F. 2d 247, 250 (2d Cir. 1972).

Apart from Dr. Abrahamsen's opinions, the literature clearly establishes the value of psychiatric testimony in a case such as this:

> "The juror cannot understand why an apparently intelligent person would perjure himself when he had so little to gain by it. The psychiatrist would know that the psychopath bears false witness because he enjoys being in the limelight (even if he degrades himself); or to vent an unconscious hostility. But this is too subtle a motivation for the average juror. Even the judge may not understand the power of malice....The malevolence which drives a psychopath into a testimonial network of lies is utterly beyond the ken of the psychiatrically unlearned jurist or juror." Davidson, Testimonial Capacity, 39 B.U.L. Rev. 172, 179 (1959).

> "In spite of his disordered personality, the psychopath may appear normal, mild-mannered and intelligent. His lies are told with more conviction than those of normal people. If his lying is exposed, he is capable of quick adjustment, misleading the layman. The psychiatrist, however, can separate the psychopathic liar from the 'normal' liar by correlating the psychopath's behavior into a diagnostic life pattern." Psychiatric Evaluation of the Mentally Abnormal Witness, 59 Yale L. J. 1324 (1950).

> [The psychopath's] disregard for truth is remarkable. Usually, he seems confident and at ease when...attempting to exculpate himself from charges of misconduct. Whether there is a good chance he will get away with a lie or whether detection is almost certain, he shows no sign of perturbation and cooly maintains hes position. While committing the most serious of perjuries, it is easy for him to look anyone calmly in the eye.
>
> Often the solemn falsehoods he perpetrates are entirely unnecessary .....
>
> Though he brings disaster repeatedly upon himself and others, he never accepts responsibility for it. As long as possible, he denies any part in what has occurred....
>
> One of the truly remarkable features of this life pattern is that a person who shows so concretely the ability to succeed will throw away all he has gained,...for no reason comprehensible to others,...The intricate pattern of gratuitous folly, nonsensical failure, and unprovoked social aggression repeated over and over may indeed impress one as an expression of madness." 1 American Handbook of Psychiatry 581-3 (Arieti, ed. 1959).[10b]

[10b] And see generally, Cleckley, The Mask of Sanity (1955); Lindner, Rebel Without a Cause (1944); Redlich and Freedman, Theory and Practice of Psychiatry 392 (1966).

Finally, even if it had not been reversible error to exclude Dr. Abrahamsen's testimony about Lipsky's mental illness and its relationship to his ability to tell the truth, the court plainly should have permitted testimony about Lipsky's narcotics addiction and its effect on credibility. As the defense pointed out to the court, there was a discrete area--Lipsky's use of drugs, both before and during his incarceration, and their effect on his credibility, that the jury couldn't possibly understand and which was plainly a medical matter (A. 839). Indeed, the records showing dosages of drugs during confinement were not even in evidence (A. 32-34, 77-78) and couldn't be read or interpreted by anyone but a doctor (A. 747). In ruling out this limited inquiry, the court plainly deprived the jury of material evidence. See Am. Jur. 2d, Evidence § 876; Effinger v. Effinger, 48 Nev. 209, 239 P. 2d 801 (1925); Anderson v. State, 65 Tex. Crim. 365, 144 SW 281 (1912); State v. Perry, 41 W. Va. 641, 24 SE 634 (1896).

IV. The Government proved no violation of 18 U.S.C. §241

The Government surprisingly argues that the Screws limitation on section 241, to rights "made definite by decision or other rule of law," is satisfied by this Court's prior decision, in this very case, holding that one has a right to be a witness (brief, p. 41). But surely a decision in 1974 cannot retroactively provide specific and definite standards for a crime allegedly committed in 1972, and, as appellant argued in his main brief, there was certainly no clear or definite determination of the matter at that time. On the contrary, the only decision squarely covering the matter, United States v. Sanges, 48 Fed. 78(C.C . Ga. 1891), writ of error dismissed, 144 U.S. 310 (1892), had held otherwise, as the Government admits.[11]

In arguing that there was evidence of a specific purpose to to kill Patsy Parks to prevent her testifying, the Government virtually ignores the main thrust of appellant's argument--that there must be a shared specific intent, i.e. proof beyond reasonable doubt that both Lipsky and Pacelli intended to kill Patsy Parks to prevent her from exercising a right to testify (appellant's brief, p. 55). There was no evidence that Lipsky had such a purpose or knew that Pacelli had such a purpose. Indeed, Lipsky's own testimony establishes that he was not informed of Pacelli's alleged reason for killing Parks until days after the murder.[12]

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[11] The Screws issue was not dealt with on the prior appeal.

[12] Some time after the murder, according to Lipsky, Pacelli explained, "It's a good thing I did what I did when I did it, because I have been in communication with my lawyer and he told me my trial is about to start next Tuesday"(A. 240) And that Parks was a key witness against him (A. 496)

Of course Lipsky testified that he believed that Parks was to be killed, but there is no evidence that he knew she was to be killed to prevent her from exercising a right to testify.

The Government likewise overlooks the fact that knowledge of the victim's citizenship, if an element of the offense, must be proved to exist with respect to both alleged conspirators, and here the Government failed to prove such knowledge on the part of either. Morrison v. California, 291 U.S. 83(1933), which the Government also ignores, is in point. That case held that Due Process of Law prohibits conviction of two alleged conspirators, for conspiracy to permit an alien not eligible for citizenship to occupy certain lands, when only one of the alleged conspirators was proved to have known of the alien status. Here, the crime charged was conspiracy to deprive a citizen of certain rights; a conspiracy to deprive one not a citizen of such rights is no crime under any section of the Code. Unless the conspirators knew they were conspiring against a citizen, they were not doing that which §241 forbids.

V. The sentencing was illegal

The Government grossly distorts appellant's arguments. No claim is made that Judge Stewart was not entitled to consider Pacelli's narcotics convictions in determining an appropriate sentence. But it was wrong to consider those offenses as prior offenses, which Judge Stewart apparently did. While the convictions preceded the conviction below, they did not precede the crime, but came afterward in point of time. Treating Pacelli as a recividist, therefore, is wholly irrational, if in fact that is what Judge Stewart did, and the record on the matter is at best ambiguous.

Whether or not Judge Pollack relied upon the Parks murder in meting out the two previous sentences, and we submit it defies common sense to suggest he did not, Judge Stewart should have ascertained whether the alleged facts of the murder were set forth in the presentence reports in the preceding cases, so that Judge Stewart could himself make a judgment as to their probable contribution to the previous sentences. This inquiry Judge Stewart declined to make.

However the matter is approached, a life sentence to begin after a thirty-five year sentence is a greater sentence than one which will commence after a twenty-year sentence. Pacelli would have been eligible for parole under the sentence imposed by Judge Tenney in slightly less than twenty-two years; he is eligible under Judge Stewart's sentence in about twenty-seven years. Eligibility for parole is a crucial component of any sentence, and especially one as severe as that imposed below. North Carolina v. Pearce, 395 U.S..711 (1969) therefore plainly applies. Had Pacelli not appealed, he would be serving Judge Tenney's sentence. Because he chose to

appeal, and succeeded, he is shackled with Judge Stewart's more severe sentence.

The Government's reliance on the Pearce exception, for "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing" is plainly misplaced. There was no conduct by the defendant since the original sentence which would warrant punishment. He has been in prison during all of that time and the only relevant or visible thing he has done since is to exercise his constitutional rights. Furthermore, none of the findings required by Pearce were made.

CONCLUSION

Appellant's conviction must be reversed.

Respectfully submitted,

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